Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

VERMILION CORPORATION,
Petitioner,

V.

SAM GREEN,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a worker injured on navigable waters of the United States excluded from coverage under the Longshore and Harbor Workers' Compensation Act because he is an individual employed in an employment listed in 33 U.S.C. §902 (3)(A) through (f) and subject to coverage under a state worker's compensation act have causes of action against his employer for unseaworthiness and negligence under the general maritime law in spite of the exclusive remedy provisions of the applicable State Compensation Act?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner Vermilion Corporation is a Delaware corporation with its principal place of business in Louisiana with no parent or subsidiary companies.

Respondent Sam Green is a citizen of Louisiana.

TABLE OF CONTENTS

	Page
OPINIONS BELOW ----------	2
JURISDICTION ----------	2
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE ----------	5
A. FACTS ----------	5
B. PROCEEDINGS BELOW -------	5
ARGUMENTS FOR GRANTING THE WRIT ----------	8
THE CIRCUIT SPLIT------- ----------	8
THE RULING BELOW IS WRONG	10
THE ISSUE IS IMPORTANT --------	17
CONCLUSION ----------	19
PROOF OF SERVICE ----------	21

INDEX TO APPENDIX

APPENDIX A Opinion of United States Court of Appeals ----------	1
APPENDIX B Opinion of United States District Court of 8 July, 1997 and Final Judgment ----------	29
APPENDIX C Opinion of United States District Court of 2 May, 1997 ----------	38
APPENDIX D Order of United States Court of Appeals denying rehearing----------	53

CITATIONS

	Page
Cases:	
Brockington v. Certified Elec., Inc., 903 F.2d 1523 (11th Cir. 1990)	7, 8, 9
Dooley v. Korean Airlines Co., Ltd., ___ U.S. ___, 118 S.Ct. 1890, ___ L.Ed.2d (1998)	12, 14, 17
Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983)	14
Karahalios v. Nat. Fed. of Federal Emp., Local 1263, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989)	13
King v. Universal Elec. Constr. Corp., 799 F.2d 1073 (5th Cir. 1986)	6, 8, 14
Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990)	13
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)	11, 12, 14

Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981)	11, 13,
Romero v. International Term. Operating Co., 358 U.S. 354, 79 S.Ct. 468, 36 L.Ed.2d 368 (1959), rehearing denied 359 U.S. 962, 79 S.Ct. 795, 3 L.Ed.2d 769	8
Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed 1099 (1946) rehearing denied 328 U.S. 878, 66 S.Ct. 1116, 90 L.Ed 1646 (1946)	16
Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978), cert. denied sub nom Atlantic Richfield Co. v. Thibodaux, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979)	6, 8, 14
Statutes:	
28 U.S.C. Sec. 1254	2
33 U.S.C. Sec. 901	2
33 U.S.C. Sec. 902	2, 6, 9, 10, 16, 17, 19
33 U.S.C. Sec. 905	5, 8, 9, 14, 16
46 U.S.C. Sec. 688	16
46 U.S.C. Sec. 761	12

La. Rev. Stat. Sec. 23:1032 4, 18

Rules
Rules of the Supreme court
of the United States, Rule 10 (a) 8

Miscellaneous:
American Gaming Association, "FOR
THE MEDIA" 17

ARTHUR ANDERSON LLP (1996) 17

Casino Journal,
October 1997 17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Vermilion Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A and is reported at 144 F.3d 332 and 1998 A.M.C. 2328.

The opinions of the United States district court appear at Appendices B and C and are unpublished.

JURISDICTION

The United States Court of Appeal for the Fifth Circuit decided this case on 18 June, 1998.

A timely suggestion for rehearing en banc treated as a petition for panel rehearing was denied on 23 October, 1998 and a copy of the order appears at Appendix D.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254.

RELEVANT STATUTORY PROVISIONS

Section 902(3) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. Sec. 901 et seq. provides in pertinent part that:

"The term 'employee' means any person engaged in maritime employment . . . but such term does not include -

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of

> any vessel; or
>
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law."

Louisiana Rev. Stat. Section 23:1032 provides in pertinent part:

> "A. (1)(a) Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all rights, remedies, and claims for damages, including but not limited to punitive or exemplary damages, unless such rights, remedies, and damages are created by a statute, whether now existing or created in the future, expressly establishing same as available to such employee, his personal representatives, dependents, or relations, as against his employer, or any principal or any officer, director, stockholder, partner, or employee

of such employer or principal, for said injury, or compensable sickness or disease."

STATEMENT OF THE CASE

A. FACTS

Petitioner employed respondent as a cook/watchman at a duck camp in the Louisiana marsh. On 10 May, 1994, respondent went to the camp dock on a canal off of Freshwater Bayou, a navigable waterway, to meet petitioner's vessel M/V GADWALL which was returning from Intracoastal City, Louisiana with a fuel tank for the camp. While mooring the vessel, respondent received injuries when he jumped from the dock to the vessel and slipped and fell.

B. PROCEEDINGS BELOW

Respondent filed suit in the United States district court asserting a claim against petitioner under 33 U.S.C. Sec. 905(b) and in the alternative, for negligence and unseaworthiness under the general maritime law.

Petitioner moved for summary judgment on the grounds respondent was not covered by LHWCA and therefore had no 905(b) claim. The district court ruled respondent was

excluded from coverage under LHWCA because he was employed by the master to unload a vessel under eighteen (18) net tons. (33 U.S.C. Sec. 902(3)(H). (Appendix C). On reconsideration, the district court ruled respondent was also excluded from LHWCA under 902(3)(B) because he was an employee of a club or camp. (Appendix B). The district court also held that respondent was subject to coverage under the Louisiana worker's compensation act and dismissed the suit on the grounds state compensation was respondent's exclusive remedy. (Appendix B).

Respondent appealed and argued the club/camp exclusion was wrongly applied by the district court. The court of appeal affirmed the district court's ruling that the club/camp exclusion was applicable. However, the court of appeal accepted respondent's alternative plea that dismissal of his suit was improper. The court of appeal held that its prior rulings in Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978), cert. denied 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274 (1979) and King v. Universal Elec. Constr. Corp., 799 F.2d 1073 (5th Cir. 1986) required the holding that the exclusive remedy provisions of the Louisiana worker's compensation act could not be applied to deprive respondent of the right to pursue

general maritime law claims for negligence and unseaworthiness recognized in a line of cases from this Honorable Court.

The court of appeal acknowledged this ruling would conflict with the decision of the United States Court of Appeals for the Eleventh Circuit in Brockington v. Certified Elec., Inc., 903 F.2d 1523 at 1533 (11 Cir. 1990) which had held that state workers' compensation employer immunity barred claims under the general maritime law for employer negligence.

Petitioner applied for rehearing. The basis was that club and camp employees injured on navigable waters are only excluded from LHWCA coverage if they are covered by a state worker's compensation act. Therefore, Congress meant for such employees, state compensation was to be the exclusive remedy which included employer immunity.

Rehearing was denied by the court of appeal. (Appendix D).

ARGUMENTS FOR GRANTING WRIT

THE CIRCUIT SPLIT

The Fifth Circuit explicitly stated its ruling would perpetuate a split in the circuits. In Brockington v. Certified Elec., Inc., decided in 1990, the Eleventh Circuit had held that an employee may not sue his employer under the general maritime law for negligence where the applicable state worker's compensation act bars such a claim. The Fifth Circuit had ruled to the contrary in Thibodaux and King, supra and has perpetuated the split in the circuits with this decision. Conflict between the circuit courts of appeal is an appropriate basis for the exercise of certiorari jurisdiction. Rules of the Supreme Court of the United States Rule, 10(a); Romero v. International Operating Term. Co., 358 U.S. 354, 358, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959),

The effect of the split will be to perpetuate different remedies for similarly situated persons. Workers in Alabama, Georgia and Florida (Eleventh Circuit) when injured on navigable waters will not be allowed to sue their employer in tort unless they are covered under LHWCA (in which case they can sue their employer under 33 U.S.C. Sec. 905(b) for vessel negligence only). However, workers in Louisiana, Mississippi and Texas (Fifth Circuit) in

similar circumstances can sue their employers for vessel and non-vessel negligence and unseaworthiness (unless they are covered by LHWCA in which case they also can sue only for vessel negligence under 33 U.S.C. Sec. 905(b)).

The Eleventh and Fifth Circuits are geographically contiguous. Many corporations and persons do business in both circuits. The split creates an incentive for forum shopping. A club/camp worker or any other worker described in 902(3)(A)(B)(C)(D)(E) and (F) injured on navigable waters in Alabama, Georgia or Florida would not attempt to sue his employer in those states. He or she would go to Mississippi, Louisiana or Texas. If he or she filed suit against the employer in federal district court in Alabama (or Georgia or Florida), it would be dismissed under Brockington. Instead, he or she can go to the neighboring state to the west and sue for vessel and non-vessel negligence and unseaworthiness and collect state workers' compensation under the ruling at issue.

The Fifth Circuit was aware of and expressly stated disagreement with Brockington. The prospect of a resolution of the circuit split appears most unlikely without Supreme Court intervention.

Any further circuits which decide this issue will side either with the Fifth or the Eleventh and the dispute will not be resolved.

THE RULING BELOW IS WRONG

The opinion of the Fifth Circuit would arguably be correct if Congress in writing 33 U.S.C. Sec. 902(3) had omitted that part which provides "if the individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law". In such a case, Congress presumably would have simply cast the (A) through (F) worker adrift in search of whatever remedy he or she could find whether it be judge made maritime law, common law or state law.

But, Congress did not omit this clause and (A)-(F) workers are only excluded when they are covered under a state workers' compensation act. If they were not subject to state compensation coverage, they would not be disqualified from LHWCA coverage.

The Fifth Circuit posed the question to be whether a state may deny a maritime worker his judge made maritime law rights to sue for negligence and unseaworthiness. Not surprisingly, having posed the question in this fashion, it answered it in the negative. "Where the LHWCA

does not apply, we refuse to expose maritime workers to the variegated state workers' compensation schemes, especially where Congress has expressly found that most 'State Workmen's Compensation laws provide benefits which are inadequate'". (Appendix A, page 15, 144 F.3d at 337-338).

The Fifth Circuit was correct to recognize the issue was one of supremacy. However, it failed to recognize that the issue was not state law v. federal law but rather judge made admiralty law v. Congressional enactment. The State of Louisiana did not say Green could not sue his employer in tort, Congress did.

This Honorable Court has consistently held that when Congress speaks, courts are not free to substitute their ". . . views for those expressed by Congress in a duly enacted statute." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626, 98 S.Ct. 2010, 2015, 56 L.Ed. 581(1978). "Even in admiralty . . . where the federal judiciary's law making power may well be at its strongest, it is our duty to respect the will of Congress." Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 96, 101 S.Ct. 1571, 1583, 67 L.Ed.2d 750 (1981).

". . . [O]nce Congress addresses a subject, even a subject previously governed by federal

common law, the jurisdiction for law making by the federal courts in greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law." Id. 451 U.S. footnote 34 at 96, 101 S.Ct. at 1583.

"In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." Id. 451 U.S. at 97, 101 S.Ct. at 1583.

Attempts to provide remedies not expressly allowed by Congress in Death on the High Seas, 46 U.S.C. sec. 761 et seq. have been uniformly disallowed. In Higginbotham, non-pecuniary losses were held not to be recoverable. Even though the act "did not address every issue of wrongful death law" it was specific on the issue of the recovery of pecuniary losses, hence non-pecuniary losses could be compensated. 436 S.Ct. at 625, 98 S.Ct. at 2015. In Dooley v. Korean Airlines Co. Ltd., ___ U.S. ___, 118 S.Ct. 1890, ___ L.Ed.2d ___ (1998) a survival action was disallowed because Congress had already decided the issue and by deciding it ". . . precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages." Ibid 718 S.Ct. at 1895.

These rulings reflect an ". . . 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. (citation omitted). In such cases, '[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.'" Karahalios v. Nat. Fed. of Federal Emp., Local 1263, 489 U.S. 527, 533, 109 S.Ct. 1282, 1286-87, 103 L.Ed.2d 539 (1989).

The Fifth Circuit failed to discuss, and only mentioned by quoting the statute verbatim that workers excluded by 902(3)(A) through (F) are excluded only if subject to state workers' compensation. The Fifth Circuit did not construe this clause, it ignored it in order "to fashion a new rule . . . (and) provide a new remedy which Congress has decided not to accept." Northwest Airlines v. Transport Workers Union, supra, 451 U.S. at 97, 101 S.Ct. at 1583.

Employer tort immunity is a common feature of all worker's compensation acts. Congress surely would have expressly declared that this immunity was abrogated had it so intended. "We assume that Congress is aware of existing law when it passes legislation." Miles v. Apex Marine Corp., 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990).

Congress enacted a comprehensive scheme providing remedies to employees injured on navigable waters. If covered by LHWCA, they may sue their employer only for vessel negligence, but not unseaworthiness. 33 U.S.C. §905 (b); Jones & Laughlin Steel Corp.v. Pfeifer, 103 U.S. 2541, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983. However, some workers who might otherwise fall under LHWCA are relegated where available to state compensation.

In the Fifth Circuit, under this ruling, only part of the state worker's compensation act will be applicable - the benefit part to the employee, not the quid pro quo of tort immunity for the employer. This disturbs the balance struck by Congress. It creates remedies clearly not intended by Congress.

The reasons advanced by the Fifth Circuit for holding that petitioner does not enjoy tort immunity are that this would conflict with its own judge made law in Thibodeaux and King. This is precisely the mischief Higginbotham and Dooley proscribed.

Once the Fifth Circuit concluded LHWCA was inapplicable, it considered itself to be unfettered by congressional intent. Secondly, faced with no statutory law on the subject, the Fifth Circuit as an admiralty court did what an admiralty court usually does when there is no statutory law, it makes law and fills gaps. The Fifth Circuit

approached the question strictly from the standpoint that a workers' right to sue his employer for injuries on navigable waters is a matter of federal maritime law and state law may intrude perhaps to supplement a remedy but never to abrogate one. The Fifth Circuit recognized respondent's right to Louisiana workers' compensation (Appendix A, page 6) but not the right of that law to afford petitioner tort immunity in exchange. The Fifth Circuit said it reached this result because of precedent from this Honorable Court.

The line of precedent cited by the Fifth Circuit in support of its ruling that the Louisiana workers' compensation act may not deprive respondent of a federally created maritime cause of action are said to involve questions of federal supremacy. How can this be a real issue when it was Congress that declared that LHWCA fails to cover only if the individual is not subject to coverage under the state workers' compensation act? When the Fifth Circuit ruled that portion of the Louisiana state workers' compensation act invalid (or inoperative, or inapplicable) which created employer immunity, it did not affirm the supremacy of federal law over state law. It in effect ruled invalid (or inoperative, or inapplicable) a part of the congressional enactment.

Part of the answer to the question about what tort causes of action may be available to 902(3)(A) through (F) workers lies in the fact that Congress made prior state workers' compensation act coverage a condition of exclusion of LHWCA coverage. However, prior state coverage was not a condition for exclusion of the (G) and (H) worker and the question should be asked "Why?" As to (G), the answer is obvious, masters and members of the crew of a vessel are covered under the Jones Act, 46 U.S.C. §688. A Person engaged by the master to load or unload a vessel under eighteen ton (H) would be doing traditional longshore work. Since prior state workers' compensation act coverage is not applicable to these workers, presumably it is this class of workers who would retain a course of action for unseaworthiness under Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.U. 872, 90 L.Ed 1099 (1946). In any event, the Fifth circuit failed to consider that certain workers were disqualified from LHWCA coverage only if covered by State Workers' Compensation and that this was meant to exclude them from asserting a Sieracki or 905(b) claim.

Congress provided a comprehensive scheme to provide a remedy for employees of clubs and camps and other workers described in 902(3)(A) through (F) who were injured on navigable waters. If covered by a state compensation act, this would

be their remedy. If not, they are covered by LHWCA. The Fifth Circuit has altered this scheme in a way which is not only wrong but unfair. A writ of certiorari should be granted to restore "Congress' considered judgment." Dooley, supra, 118 S.Ct. 1t 1895.

THE ISSUE IS IMPORTANT

At issue here is not just employees of clubs and camps. 902(3)(A) through (F) lists a large number of occupations including employees of "recreational operations" which presumably would be broad enough to cover floating casinos. There is not now available statistics on the number of persons potentially directly affected by this decision. There are however six states that have casinos riverboats (or dockside). Two of these states, Louisiana and Mississippi, are in the Fifth Circuit. Casino Journal, Oct. 1997.

In Mississippi alone, the casino industry employs 3% of the state's entire work force according to the American Gaming Association "For the Media". In 1996, Arthur Anderson L.L.P. found there were 40,000 workers in Louisiana and Mississippi employed in the casino industry.

This ruling also impacts clerical, secretarial and security workers (A), marina employees not engaged in construction (C), suppliers, transporters and vendors (D), aquaculture workers (E) and building repairers or dismantlers of vessels under sixty-five feet in length (F).

A reasonable forecast of the number of persons who may be affected by this decision is not possible.

Consider for the moment the respondent. He was employed as a cook at a land camp. But for the fact he jumped from the dock onto a vessel on navigable waters, he would probably never ever be considered a "maritime worker" for any purpose. Had he been injured in the kitchen were he worked 99.9% of the time, he clearly would have been covered by Louisiana state workers' compensation and foreclosed from a tort suit against his employer under La. Rev. Stat. sec. 23:1032(A). How many other such workers are there who may occasionally find themselves on navigable waters?

The circuit split potentially affects a significantly large number of persons. Therefore, this case presents an important issue.

CONCLUSION

Petitioner submits the Court of Appeals for the Fifth Circuit failed to recognize Congress' pre-eminent role in law making by failing to properly apply that part of 902(3) which exempted workers from coverage only if covered by a state workmen's compensation act. Once the state compensation act became applicable, all of it should have been applied including employer tort immunity.

A prominent aspect of workers' compensation law such as an employer tort immunity should not so easily be abrogated simply because an essentially non-maritime worker was fortuitously injured on navigable waters. Congress meant such workers to seek their redress under state compensation law, not the general maritime law.

Petitioner respectfully requests that a writ of certiorari be granted to review the decision of the Fifth Circuit.

Respectfully submitted

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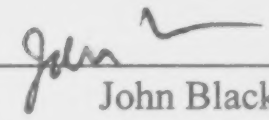
By 
John Blackwell

APPENDIX

INDEX FOR APPENDIX

	Page
APPENDIX A	1
APPENDIX B	29
APPENDIX C	38
APPENDIX D	53

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-30782

SAM GREEN

Plaintiff-Appellant,

versus

VERMILION CORPORATION

Defendant-Appellee

Appeal from the United States District Court,

for the Western District of Louisiana

Before WISDOM, JOLLY, and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

We are called to interpret a heretofore unconstrued provision of the Longshore and Harbor Workers Compenstion Act, viz., the "club/camp" exclusion delineated at 33 U.S.C. sec. 902(3)(B). Our reading of the statute and its legislative history compels us to conclude that Green falls into the category of employees for which Congress drafted the "club/camp" exception. We AFFIRM the judgment of the district court denying LHWCA coverage to Green. We REVERSE the judgment of the district court dismissing Green's general maritime negligence and unseaworthiness claims and REMAND for further proceedings.

I

The Vermilion Corporation employed Green at a "duck camp" it operated pursuant to its contract with the Bayou Club. The camp is located on marsh land near a private canal off a bayou. Besides a duck camp, Vermilion uses the post as a "headquarters" for its operations in this area, which include harvesting and selling alligator eggs, trapping and selling alligators, fur trapping, shrimping, and rice farming.

During duck season, which is approximately three months long, Green worked as both a cook and watchman at the camp. During the rest of the year, Green served as a watchman, performed general maintenance on the camp and usually cooked a lunch meal for any Vermilion employees working in the area. Green worked only at the camp and was required to stay there from Monday at 8:00 a.m. to noon on Friday, except for duck season when his hours were longer. Green got to the camp via a boat and usually brought a week's worth of groceries with him on Monday morning. Green also occasionally assisted in mooring and unloading supply boats that docked at the camp.

On May 10, 1994, Lee Guidry, a Vermilion employee, was piloting THE M/V GADWALL, a vessel under eighteen tons net. Guidry radioed Green at the camp and asked him to assist in tying up the vessel and in unloading supplies and equipment. While mooring the vessel, Green boarded THE M/V GADWALL, slipped and fell on the deck. Green sustained injuries to his neck and back.

Green filed suit against Vermilion alleging claims under the LHWCA and general maritime law for negligence and unseaworthiness. The district court first granted Vermilion's motion for summary judgment dismissing Green's LHWCA claim

because Green fell under the "vessel under eighteen tons net" employee exception. Then, after further briefing by the parties, the district court granted Vermilion's motion for summary judgment and reconsideration, holding that Green was excluded from LHWCA coverage by the "club/camp" employee exception. The district court dismissed the remainder of Green's claims on the grounds that the Louisiana Worker's Compensation Act was his exclusive remedy.

Green timely appealed the district court's judgments. We have jurisdiction under 28 U.S.C. sec. 1291.

II

This court reviews a grant of summary judgment de novo applying the same standard as did the district court. Dawkins v. Sears Roebuck & Co., 109 F.3d 241, 242 (5th Cir. 1997).

In order to qualify for coverage under the LHWCA, a worker must pass both a situs and a status test. Director v. Perini North River Assocs., 459 U.S. 297, 314 (5th Cir. 1983). Green satisfies the situs test since he was injured upon navigable waters. See id. With respect to the status test, we will assume arguendo that Green was engaged in "maritime employment", see 33 U.S.C. sec. 902(3);

Randall v. Chevron U.S.A., Inc., 13 F.3d 888, 897 (5th Cir.), cert. denied, 513 U.S. 994 (1994), since we think it clear that he falls within the "club/camp" exclusion from LHWCA coverage.

There are exceptions to the term "employee" under the LHWCA. See 33 U.S.C. sec. 902(3)(A)-(H). In particular, sec. 902(3)(B) provides:

> The term "employee" means any person engaged in maritime employment, . . . but such term does not include -
>
> > (B) individuals employed by a club, camp, recreational operation, museum, or retail outlet;
>
> if individuals described in clauses (A) through (F) are subject to coverage under a state workers' compensation.[1] Id.

Interpretation of this provision is an issue of first impression in this circuit.

The district court held that Green fell within the "club/camp" exclusion because he performed all of his duties at the duck camp. The lower court found unpersuasive Green's argument that he was employed "by" the Vermillion Corporation, not a camp, since that construction of sec. 902(3)(B) renders the exception meaningless in today's world

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[1] The parties agree that Green falls within the purview of the Louisiana Workers' Compensation Act.

of business organizations. Green repeats this argument to us. Green contends that interpretation of sec. 902(3)(B) is controlled by the nature of the employer's business and not the employee's activities. For support, Green points to the House Document accompanying the 1984 Amendments that added the "club/camp" exception to the LHWCA. The House Document states that the "exclusions from the definition of 'employee' contained in the amendments . . . are intended to be narrowly construed" and that paragraph (B) excludes employees "because of the nature of the employing enterprise, as opposed to the exclusions in paragraph [(A)], which are based on the nature of the work which the employee is performing." H. R. Doc. No. 98-570, Part I 98th Cong., 2nd Sess. 1984 U.S.C.C.A.N. (98 Stat. 1639) 2734, 2736. Because Vermillion is involved in sundry business ventures, including maritime activities, Green claims that his employer was a multi-faceted corporation, not a "camp".

"As with any statutory question, we begin with the language of the statute." In re Greenway, 71 F.3d 1177, 1179 (5th Cir.), cert. denied, 517 U.S. 1244 (1996). Green makes much of Congress' use of "by" in the statute and notes that Congress did not use the phrase "employed at a club [or] camp." Contrary to Green, we do not think that the word "by" bears such weight. Rather, the key words in

the provision are those designating the concerns the employees of which are excluded from LHWCA coverage (e.g., club, camp, restaurant, museum). Under this focus, it is evident that Green worked exclusively to further an operation which comports with the plain meaning of the terms "camp" and "club". The Vermillion facilities had all the trappings of a typical southern Louisiana hunting camp. See R. Vol. 2 at 281. Though it used the camp throughout the year, the primary reason Vermillion maintained the facility was to fulfill its contractual obligation to the Bayou Club to provide a duck camp for the waterfowl hunting season. In fact, a Vermilion officer testified that but for the lease to the Bayou Club, Vermillion would not have conducted any of its operations from this site and would not have had any need for Green's services. See R. Vol. 2 at 287-88. Since Green was employed solely to render services to promote and maintain a duck camp, we hold that he is excluded from LHWCA coverage under sec. 902(3)(B).

Green's reliance upon the legislative history of the 1984 Amendments does not alter our conclusion. Unlike Green, we do not believe that in construing the "club/camp" exception, we are limited to considering only the nature of the employer's enterprise. The House Document to which Green refers expressly states that businesses falling under paragraph (B) may have employees

that should remain covered under the Act "because of the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. Doc. No. 98-570, Part I 98th Cong., 2nd Sess. 1984 U.S.C.A.A.N. (98 Stat. 1639) 2737. By the same token, we believe the opposite is true - clubs and camps may employ individuals who should not be covered under the LHWCA because their job responsibilities do not, or only minutely, involve maritime activities and they are not exposed to hazards associated with traditional maritime activities. The record reflects that Green's duties were to be a cook, watchman, and general repairman of the camp buildings. We do not consider Green to be an employee for which LHWCA benefits were intended.

III

Even if he is not entitled to LHWCA benefits, Green argues that the district court erred in dismissing his general maritime claims against Vermilion for negligence and unseaworthiness. Vermilion disagrees based on its belief that the Louisiana Workers' Compensation Act is Green's exclusive remedy.

A

The first step in our analysis of this issue is to determine whether there is admiralty jurisdiction. Admiralty jurisdiction requires that the tort have a

maritime locality and that "the facts and circumstances of the claim must bear a significant relationship to traditional maritime activity." Thibodaux v. Atlantic Richfield Co., 580 F.2d 841, 846 n.14 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979). The situs test is met because Green was injured while on navigable waters. See Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974). To determine whether there is a sufficient nexus to maritime activity, we examine four factors: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law. See Kelly, 485 F.2d at 525. In applying this test, we have noted that "[a]dmiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters", id. At 526, and that "the relationship to traditional maritime activity required for the invocation of admiralty jurisdiction" may be present though "the threshold requirement of maritime employment necessary to establish coverage under the LHWCA" may not be met. Thibodaux, 580 F.2d at 846.

Applying the four factors, we find that Green was injured in the course of his employment while performing the traditional maritime activity of mooring a vessel; Vermilion owned the vessel on which Green fell; the vehicle involved was a vessel

routinely employed on navigable waters; the alleged cause of Green's injury was an unkept deck; Green's injury was not uncommon in the maritime context; and "upholding maritime jurisdiction does not stretch or distort long evolved principles of maritime law," Kelly, 485 F.2d at 526, since federal courts have long recognized unseaworthiness and general maritime negligence claims. These facts provide a sufficient nexus to maritime activity for us to assert admiralty jurisdiction over this case. See, King v. Universal Elec. Constr. Corp., 799 F.2d 1073, 1075 (5th Cir. 1986); Thibodaux, 580 F.2d at 846 n.145; Kelly, 485 F.2d at 526.

B

With respect to the merits, we note that an earlier panel of this court was "squarely presented with the issue of whether an exclusive remedy provision in a state workers' compensation statute can operate to deprive a party of a cause of action afforded by federal maritime law." Thibodaux, 580 F.2d at 846. The panel in that case concluded that relevant Supreme Court and Fifth Circuit precedent made "it clear that an exclusive remedy provision in a state workmen's compensation law cannot be applied when it will conflict with maritime policy and undermine substantive rights afforded by federal maritime law." Id. at 847. Thus, the court specifically held that "the exclusive remedy provision of the Louisiana Workmen's

Compensation Act" does not preclude a plaintiff from pursuing a claim for wrongful death occasioned in state territorial waters since the Supreme Court had expressly recognized such a suit under admiralty jurisdiction. Id. at 847; see also Moragne v. States Marine Lines, 398 U.S. 375 (1970) (creating wrongful death claim in admiralty law). A later panel of this court strengthened Thibodaux by holding that irrespective of whether the defendant in the maritime tort suit is the plaintiff's "statutory employer," like in Thibodaux, or his "actual employer," federal maritime law overrides the exclusive remedy provision of the Louisiana Workers' Compensation Act in each case. See King, 799 F.2d at 1074.

The Eleventh circuit appears to have charted a different course as it barred a plaintiff from asserting a negligence claim under general maritime law where an exclusivity provision of a state workers' compensation scheme applied. See Brockington v. Certified Elec., Inc., 903 F.2d 1523, 1533 (11th cir. 1990), cert. denied, 498 U.S. 1026 (1991). That circuit distinguishes Thibodaux and King on the grounds that they apply only to wrongful death actions, a tort for which the Supreme Court expressly recognized admiralty jurisdiction in order to provide national uniformity. We are not persuaded that the Eleventh Circuit ruling conflicts with our precedent with respect to a

plaintiff's ability to assert a unseaworthiness claim in the face of an exclusive remedy provision of a state workers' compensation statute.

Though Thibodaux and King involved wrongful death claims, their holdings were based on the Supreme Court's pronouncement that "'[w]hile states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.'" Thibodaux, 580 F.2d at 846 (quoting Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953)). As the Eleventh Circuit admitted in Brockington, the Supreme Court has expressly authorized a claim for unseaworthiness in admiralty jurisdiction. See Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Brockington, 903 F.2d at 1531. That unseaworthiness is a "right peculiar to the law of admiralty" allowed the Brockington court to distinguish this court's opinion in Brown v. ITT Rayonier, Inc., 497 F.2d 234 (5th Cir. 1974), which "disregard[ed] the state worker's compensation statute in favor of permitting an action in general maritime law," from the case before it in which the plaintiff was asserting a negligence claim. Brockington, 903 F.2d at 1531. Since both the wrongful death claim alleged in Thibodaux and King and the unseaworthiness claim asserted here and in Brown trace their lineage to Supreme Court

explications of admiralty law, we see no reason to give one more preemptive force than the other. With this principle, we think the Eleventh Circuit would agree. Thus, following the principles established in Thibodaux and King, we hold that the exclusive remedy provision of the Louisiana Workers' Compensation Act does not preclude Green from asserting his claim for unseaworthiness.

Our holding is supported by the history of the LHWCA and its treatment of Sieracki claims. In enacting the 1972 Amendments to the LHWCA, Congress increased the statutory benefits to longshoremen in exchange for the termination of their claims for breach of the warranty of seaworthiness. See 33 U.S.C. sec. 905(a); Aparicio v. Swan Lake, 643 F.2d 1109, 1117 (5th Cir. 1981). We have held, however, that longshoremen who are not entitled to LHWCA benefits may still pursue their general maritime claims against the vessel owner because they did not receive the benefits of the bargain of the 1972 Amendments. See id. at 1118 (recognizing "pockets of Sieracki seamen remaining after the 1972 amendments" to the LHWCA); Cormier v. Oceanic Contractors, Inc., 696 F.2d 1112, 1113 (5th Cir.) (Higginbotham, J.) (following Aparicio that sec. 905 "did not deny the warranty of seaworthiness to workers not covered by the LHWCA"), cert. denied, 464 U.S. 821 (1983). Vermilion seeks to distinguish these cases on the

ground that they did not involve a situation, like in the instant case, where the longshoreman was entitled to benefits under a state workers' compensation scheme which made the state compensation benefits the employee's exclusive remedy against his employer, including any claim under a dual capacity theory. See La. Rev. Stat. Sec. 23:1032(A) (Supp. 1998).

We find Vermillion's distinction nebulous. Though Green is entitled to seek relief under the Louisiana Workers' Compensation Act, that option is not exclusive. See Sun Ship, Inc. v. Pennyslvania, 447 U.s. 715, 722 (1980) (finding concurrent federal and state jurisdiction for maritime employees covered by both the LHWCA and a state workers' compensation scheme) The 1972 Amendments to the LHWCA, "which Congress enacted to abolish the Sieracki remedy, [do] not apply to maritime workers who are not within the coverage of the LHWCA." Aparicio, 643 F.2d at 1116. Where the LHWCA does not apply, we refuse to expose maritime workers to the variegated state workers' compensation schemes, especially where Congress has expressly found that "most State Workmen's Compensation laws provide benefits which are inadequate." H.R. Doc. 92-1441, 92th Cong., 2nd Sess. 1972 U.S.C.C.A.N. 4698, 4707; see also Sun Ship, 447 U.S. at 723 n.5. Green may pursue his Sieracki claim against Vermillion

despite the availability of relief under the Louisiana Workers' Compensation Act. [2] This court's decision in Kent v. Shell Oil Co., 286 F.2d 746 (5th Cir. 1961), does not require a contrary result. In that case, Kent, a truck driver who performed all of his job duties on land, was injured while unloading pipe from a truck onto a barge. See id. at 748-49. Kent did not plead or allege a claim of unseaworthiness until he requested a jury instruction on this theory of liability. See id. at 749-50. The appellate court affirmed the district court's refusal to instruct the jury on seaworthiness. See id. at 750. Though one of the reasons for its decision was the presence of the exclusive remedy provision of the Louisiana Workers' Compensation act, see id. at 751-52, we think Kent is factually and legally distinct from the case at bar.

In Kent, the court gave special significance to the fact that Kent was solely a land-based worker who did not perform any maritime activity and was injured on land. See id. at 751. The court analyze the case as one involving a land tort and controlled by local law. See id. Given the weak nexus between the facts and circumstances of Kent's claim with traditional maritime activity, we doubt if admiralty jurisdiction would even lie in such a case

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[2] In so ruling, we do not intimate on the merits of Green's claim.

under our current precedent. See Kelly, 485 F.2d at 525-26. In addition, no evidence supported Kent's unseaworthiness claim. See Kent, 286 F.2d at 752-53. Here, admiralty jurisdiction lies as Green was injured upon navigable waters while performing the traditional maritime activity of mooring a vessel in preparation for unloading cargo. Green also presented evidence suggesting that the deck of the vessel was in disrepair. We limit Kent, a pre-Kelly case, to its facts and do not ascribe to it the power to foreclose the assertion of an unseaworthiness claim where a state workers' compensation scheme purports to be a plaintiff's exclusive remedy.

C

We next turn to whether Green may assert his general maritime negligence claim against Vermilion, his employer, despite the exclusivity provision of the Louisiana Workers' Compensation Act. We examine Green's general maritime negligence claim separately from his unseaworthiness claim. A general maritime negligence claim has a Supreme Court heritage, see Leathers v. Blessing, 105 U.S. (15 Otto) 626 (1882) (recognizing general maritime negligence claim); Pope & Talbot, 346 U.S. 406 (same), but is not as unique to admiralty law as unseaworthiness. See 1 Thomas J. Schoenbaum, Admiralty and Maritime Law sec. 5-2 to sec. 5-4 (2d 3d. 1994) (discussing fundamental negligence concepts in maritime

context); see also Cox v. Esso Shipping co., 247 F.2d 629, 637 (5th Cir. 1957) (delineating differences between unseaworthiness and general maritime negligence claims). In addition, states have a greater interest in overriding negligence claims of an employee against his employer via its workers' compensation statute than a claim of unseaworthiness since states enacted employment compensation schemes to preclude precisely these types of suits. See Ellis v. Normal Life, 638 So.2d 422, 426-27 (La. Ct. App. 1994).

We begin our discussion by noting that the Supreme Court admittedly has been "unable to give any guiding, definite rule to determine the extent of state power" in the maritime field with respect to providing remedies to injured workers. Davis v. Department of Labor, 317 U.S. 249, 253 (1942); see also Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, 274 (1959) (Stewart, J., dissenting) (observing the Supreme Court's struggle with harmonizing federal and state compensation schemes in the maritime area); Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1916) ("[I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation."). There are conflicting lines deciding the force to be given an exclusive remedy provision

of a state workers' compensation statute in the maritime context. [3] See Davis, 317 U.S. at 253

One line of cases unequivocally holds that state workers' compensation statutes can not preclude an employee from asserting a general maritime negligence claim against his employer for injuries sustained on navigable waters during the course of his employment. See Southern Pac., 244 U.S. at 217 (holding the New York Workers' Compensation Act unconstitutional to the extent it bars an employee from alleging a general maritime negligence claim against his employer); Clyde S.S. v. Walker, 244 U.S. 255, 257 (1916) (following Jensen); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 163-64 (1920) (striking down Congress' first attempt to permit application of state workers' compensation schemes in maritime field because

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[3] Apparently the court in Brockington only unearthed the line of Supreme Court cases giving preclusive effect to state workers' compensation statutes since it failed to cite any of the cases recognizing the superiority of general maritime tort claims over state remedies. See Brockington, 903 F.2d at 1532. Since our holding today relies heavily on this more venerable line of Supreme Court precedent which the Eleventh Circuit did not treat, we think the split with our sister circuit which we create today will be short-lived. (listing cases).

Congress may not delegate its power to alter, amend, or revise the maritime law to the states); Washington v. W. C. Dawson & Co., 264 U.S. 219, 227-28 (1924) (invalidating Congress' second attempt to incorporate state workers' compensation statutes into federal maritime law); Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171, 172 (1924) (approving assertion of general maritime negligence claim by employee against his employer); Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449, 457 (1924) (finding erroneous a jury instruction which permitted the jury to consider state law in determining whether employer was negligent because "[t]he rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute"); Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 147 (1928) (reversing judgment awarding state workers' compensation benefits to widow of deceased stevedore because only federal maritime law may provide remedies); John Baizley Iron Works v. Span, 281 U.S. 222, 230-32 (1930) (denying workers' compensation benefits to ship repairman injured upon navigable waters since state law may not modify rights under admiralty law); Employers' Liab. Assurance Corp. v. Cook, 281 U.S. 233, 236 (1930) (precluding state workers' compensation award because "State lacked power to prescribe the rights and liabilities of the parties growing out of the accident"); Nogueira v.

New York, New Haven & Hartford R.R. Co., 281 U.S. 128, 138 (1930) (commenting that "had the petitioner been engaged in intrastate commerce, his case still would have been within the maritime jurisdiction of the Federal courts, and he would have been denied the benefits of the state compensation law"); Spencer Kellogg Co. v. Hicks, 285 U.S. 502, 513 (1932) ("The workmen's compensation law of New Jersey, the purpose of which was to supersede the common law redress in tort cases and statutory rights consequent upon death by wrongful act, and to substitute a commuted compensation for injury or death of an employee, irrespective of fault, is not applicable to the injuries and deaths under consideration.").

This line of precedent is itself supported by cases refusing to subordinate federal admiralty principles to the dictates of state law. See e.g., The Key City, 81 U.S. (14 Wall.) 653, 660 (1871) (stating that doctrine of laches, not state statutes of limitations, apply to suits enforcing maritime liens); Workman v. City of New York, 179 U.S. 552, 560 (1900) ("[I]t becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States.");

Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52, 61-63 (1913) (recognizing admiralty jurisdiction over stevedore's negligence claim against employer for injuries sustained while on navigable waters); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 382 (1918) ("[N]o State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law."); Union Fish Co. v. Erickson, 248 U.S. 308, 312-14 (1919) (refusing to void maritime contract for failure to comply with state statutes of frauds); Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961) (same).

Other cases run directly contrary to the authorities supra as they purport to hold that the exclusive remedy provision of a state workers' compensation statute precludes an employee from asserting a general maritime negligence claim against his employer. See Grant Smith-Porter Co. v. Rohde, 257 U.S. 469, 477 (1922) (enforcing exclusive remedy provision of state workers' compensation statute so as to bar any maritime claim); State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263, 276 (1922) (affirming award of workers' compensation benefits to widow of longshoremen killed while unloading a vessel on navigable waters because employment contract was not maritime in nature); Millers' Indem. Underwriters v. Braud, 270 U.S. 59, 64-65 (1926)

(concluding that state workers' compensation statute's "exclusive features abrogate the right to resort to the admiralty court which otherwise would exist"); T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 181 (1928) (Louisiana workers' compensation law provided the exclusive remedy because the longshoreman was killed while standing on land and not on navigable waters); Alaska Packers, Assoc. v. Industrial Accident Comm'n, 276 U.S. 467, 468-69 (1928) (affirming award of workers' compensation benefits as employee's sole remedy against employer); Sultan Ry. & Timber co. v. Department of Labor & Indus., 277 U.S. 135, 137 (1928) (rejecting constitutional attack on workers' compensation statute requiring companies engaged in maritime activities to pay into state fund); P.J. Carlin Constr. Co. v. Heaney, 299 U.S. 41, 44 (1936) (refusing to allow general maritime law claim where workers' compensation statute applied). [4]

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[4] The court in Brockington relies heavily on Heaney for its holding, see Brockington, 903 F.2d at 1532, but we distinguish Heaney from the other cases in the Grant Smith line and the case at bar on the grounds that in Heaney the employee plaintiff did not assert negligence on the part of his employer. See Heaney, 299 U.S. at 44.

Though there is an apparent rift in precedent, the Supreme Court harmonized its cases on the grounds that the state workers' compensation statutes could only apply where the maritime tort involved matters of local concern which had remote or no relation to navigation or maritime commerce. See Baizley, 281 U.S. at 230-31; Perini, 459 U.S. at 306 (tracing history of "maritime but local" doctrine).[5] In fact, the constant theme of these Supreme Court opinions is that the uniformity of admiralty law must be preserved and that state law may be applied only where it works no "material prejudice to the essential features of the general maritime law." Baizley, 281 U.S. at 230. That uniformity is not to be sacrificed to accommodate state law is a fundamental premise of admiralty jurisdiction. See Grant Gilmore & Charles L.

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[5] The Supreme Court tried to use the "maritime but local" doctrine to establish the boundaries of LHWCA and state workers' compensation coverage, but abandoned its efforts after such a distinction proved unworkable. See Davis, 317 U.Sl at 253-56. In Davis, the Supreme Court charted a new course by recognizing the existence of a "twilight zone" in which employees are simultaneously covered by both the LHWCA and the state workers' compensation scheme. Id. at 256 . With the 1972 Amendments to the LHWCA, Congress extended the realm of concurrent jurisdiction shoreward. See Sun Ship, 447 U.S. at 720.

Black, Jr., The Law of Admiralty sec. 6-58 to sec. 6-61 (2d Ed. 1975). In one of its earliest pronouncements on the interplay between federal and state law in the maritime context, the Supreme Court stated:

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874). This is not to say that state law may play no part in the maritime arena; rather, the flip side of this principle is that "[w]ith respect to maritime torts . . . the State may modify or supplement the maritime law . . . when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." Just v. Chambers, 312 U.S. 383, 388 (1941). For example, prior to its decision in Moragne, the Supreme Court

consistently gave effect to state statutes providing a wrongful death action to the representatives of maritime workers killed during the course of employment. See id. at 388-89; see also Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 321 (1955) (leaving the regulation of marine insurance to the states).

Our review of the Supreme Court's admiralty jurisprudence assures us of the soundness of our earlier holdings in Thibodaux and King. As we noted supra, Thibodaux's holding was driven by the Supreme Court's decision in Pope which iterated the supremacy of federal admiralty rights over state law mandates where uniformity concerns were present. See Thibodaux, 580 F.2d at 846. Contrary to the Eleventh Circuit's view, see Brockington, 903 F.2d at 1531, we do not read Thibodaux and King to be limited to wrongful death actions. We see no principled basis for distinguishing between an employee's negligence claim against his employer for wrongful death and an employee's negligence claim against his employer where the injury stops short of a fatality. The key factor is maintaining uniformity in admiralty law and preserving the rights granted to maritime workers, not the degree of harm the worker suffers. An action for negligence has long been a vestige of general maritime law; subjecting it to the ebbs and flows of state legislation would disrupt the essential features

of admiralty law. See Stanley Morrison, Workmen's Compensation and the Maritime Law, 38 Yale L.J. 472, 496 (1929). Fidelity to the Supreme Court's and our own precedent requires that we hold that the exclusive remedy provision of the Louisiana Workers' Compensation Act does not preclude Green from asserting his general maritime negligence claim against Vermilion for the non-fatal injuries he sustained during the course of his employment while upon navigable waters.[6] where this court held that the exclusive remedy provision of the Texas Workers' Compensation Act did not bar a ship owner's indemnity suit against the stevedore for breach of warranty where the stevedore had made payments under the state

IV

The judgment of the district court denying Green LHWCA benefits is AFFIRMED. The judgment of the district court dismissing Green's unseaworthiness and general maritime negligence

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[6] Our holding is consistent with the decision in Koninklyke Nederlandsche Stoomboot Maalschappy v. Strachan Shipping Co., 301 F.2d 741 (5th Cir.), cert. denied, 371 U.S. 921 (1962), workers' compensation scheme. As with his unseaworthiness claims, we make no comment concerning the merits of Green's negligence claim.

claims is REVERSED. We REMAND for proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

SAM GREEN CIVIL ACTION NO. 95-2118

VERSUS JUDGE DOHERTY

THE VERMILION
CORP., ET AL MAGISTRATE JUDGE TYNES

MEMORANDUM RULING

Before this Court is defendant's, The Vermilion Corporation's ("Vermilion"), Motion for Summary Judgment and for Reconsideration. This Court issued a Memorandum Ruling on May 2, 1997 granting Vermilion's previously filed motion for summary Judgment in part and denying it in part. Specifically, this Court dismissed plaintiff's, Sam Green's, claims against Vermilion under the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. sec. 901 et seq. However, this Court did not reach Vermilion's argument that all of plaintiff's claims against Vermilion should be dismissed because plaintiff's sole remedy is Louisiana Workers' Compensation law, as this Court found neither party had adequately briefed the

issue. This Court dismissed plaintiff's claim under the LHWCA, finding plaintiff was excluded from coverage under the LHWCA by sec. 902(3)(H), the small vessel under 18 tons net exclusion. The Court did not reach Vermilion's argument that plaintiff was also excluded under sec. 902(3)(B), the "club" or "camp" exclusion. Vermilion now asks this Court, in the interest of judicial efficiency as this matter is expected to be appealed to the Fifth Circuit, to address Vermilion's argument regarding the "club" or "camp" exclusion. Vermilion also reurges its motion to dismiss all of plaintiff's claims against Vermilion on the grounds that plaintiff's sole remedy is Louisiana Workers' Compensation law.

Plaintiff has submitted an opposition to this motion. However, plaintiff argues only that he is not excluded from coverage under the LHWCA under the "club" or "camp" exclusion. Plaintiff does not address Vermilion's argument that as plaintiff has no claim under the LHWCA, all of his claims should be dismissed as his sole remedy is Louisiana Workers' Compensation law.

For clarity's sake, this Court will address plaintiff's focus and Vermilion's argument that plaintiff is excluded from coverage under the LHWCA by sec. 902(3)(B), the "club" or "camp" exclusion. Said exclusion provides, in relevant part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and ship-breaker but such term does not include –
>
> . . .
>
> (B) Individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet . . .

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law. 33 U.S.C. sec. 902(3). It is undisputed that plaintiff was employed by Vermilion as a cook and watchman at a "duck camp" operated by Vermilion in fulfillment of its contractual obligations to an entity known as the Bayou Corporation. It is also undisputed that Green, during water fowl hunting season, served as a cook and watchman at the camp, and during the rest of the year he served as a watchman at the camp. The parties disagree as to whether Green's duties also included providing meals for other employees of Vermilion during the year, or loading and unloading vessels owned by Vermilion. However, it is undisputed that plaintiff worked only at the duck camp.

Plaintiff argues, however, that he was not employed by a club or camp, but rather by a corporation, specifically the Vermilion Corporation. Plaintiff therefore argues that he does not fall within the sec. 902(3)(B) exclusion. However, this Court notes that many clubs, camps, recreational operations, restaurants, museum, and retail outlets, if not most, are owned and operated by corporations. Plaintiff provides no statutory or case law to support plaintiff's argument that the exclusion does not cover camps owned or operated by a corporation. This Court finds that a plain reading of the sec. 902(3)(B) exception for workers employed by a "club" or "camp" excludes plaintiff from coverage under the LHWCA. It appears to have been the clear intent of Congress to exclude from coverage under the LHWCA those workers employed at clubs or camps. This Court sees no reason to read into the sec. 902(3)(B) exclusion a limitation that would render the exclusion largely without purpose in the light of prevalent business structuring – namely, a requirement that the club, camp or restaurant not be owned or operated by a corporation. Similarly, this Court rejects plaintiff's argument that he is not excluded by sec. 902(3)(B) as he was employed by a corporation, Vermilion, that engages in much activity, such as agriculture, that has nothing to do with the duck camp at which plaintiff was employed. All of plaintiff's duties as an employee of Vermilion were performed at the

duck camp. Section 902(3)(B) excludes plaintiff from coverage under the LHWCA. Therefore, plaintiff is excluded from coverage under the LHWCA by sec. 902(3)(B), as well as by sec. 902(3)(H), the small vessel exception, upon which this Court previously based its granting of Vermilion's motion for summary judgment upon plaintiff's claims under the LHWCA.

It is undisputed that plaintiff is subject to coverage under Louisiana Workers' Compensation law. As plaintiff is excluded from coverage under the LHWCA, plaintiff's exclusive remedy is that provided by the Louisiana Workers' Compensation Act. La. Rev. Stat. 23:1032. Therefore, all of plaintiff's claims against Vermilion must be DISMISSED.

Conclusion

Based on the foregoing reasoning, Vermilion's Motion for Summary Judgment and Reconsideration is GRANTED , and all of plaintiff's claims against Vermilion must be DISMISSED.

THUS DONE AND SIGNED this 8 day of July, 1997.

/S/ Rebecca F. Doherty
REBECCA F. DOHERTY

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

SAM GREEN CIVIL ACTION NO. 95-2118

VERSUS JUDGE DOHERTY

THE VERMILION CORP., ET AL MAGISTRATE JUDGE TYNES

ORDER

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Vermilion Corporation's Motion for Summary Judgment and for Reconsideration is GRANTED.

Lafayette, Louisiana, this 8 day of July, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT
JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

SAM GREEN CIVIL ACTION NO: 95-2118

VERSUS JUDGE DOHERTY

THE VERMILION CORPORATION, ET AL MAGISTRATE JUDGE TYNES

MEMORANDUM RULING

Before this court is defendant's, The Vermilion Corporation's ("Vermilion"), Motion for Summary Judgment, urging this Court to dismiss plaintiff's, Sam Green's ("Green"), complaint. Vermilion argues that Green is specifically excluded from coverage under the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. Sec. 901, et seq., as an employee of a "club" or "camp,"[1] and "engaged by a master to load or unload or repair any small vessel under 18 tons net." Vermilion further contends that as Green is excluded from coverage under the LHWCA, his

[1] 33 U.S.C. sec. 902(3)(B).

exclusive remedy is Louisiana workers' compensation law. Green opposes this motion.

Facts

The relevant facts of this matter are largely undisputed. Plaintiff, Sam Green, was employed by The Vermilion Corporation as a cook and watchman at a "duck camp" operated by Vermilion in fulfillment of its contractual obligations to an entity known as the Bayou Corporation. Vermilion refers to this entity as the "Bayou Club," and Green refers to the entity as the "Bayou Corporation." It is undisputed that Green, during the water fowl hunting season, served as a cook and watchman at the camp, and during the rest of the year he served as a watchman at the camp. The parties appear to disagree as to whether Green's duties also included providing meals for other employees of Vermilion during the year, or loading and unloading vessels owned by Vermilion.

On May 10, 1994, Lee Guidry, also an employee of Vermilion, was operating either the M/V GADWALL or M/V TEAL. These are both small vessels under 18 tons net, and both are owned and operated by Vermilion. As Guidry returned to the camp in the vessel, he contacted Green by radio in order to obtain his assistance. Whether Green was to simply assist in tying the vessel to the dock,

or was to assist as well in the unloading of the vessel appears to be in dispute. Green claims that he went to the dock and jumped onto the deck of the vessel, at which time he slipped because of a substance on the deck of the vessel and injured his back and neck.

On November 30, 1995, Green filed a complaint against the Vermilion Corporation and an entity known as Radcliffe Materials, Inc. Green made claim under secs. 905(a) and (b) of the Longshore and Harbor Workers' Compensation Act against Vermilion as the owner of the vessel upon which plaintiff was injured. In Green's complaint, he alleges he was injured upon the M/V TEAL. However, in argument to this Court, he asserts he was injured aboard the M/V GADWALL. As seen below, a distinction between these two similar vessels is unnecessary to decide the issues now before this Court. Green also brought claims for general maritime law negligence and for unseaworthiness.

Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986). After a proper motion for summary judgment is made, the non-movant has the burden of proving that there is a genuine issue for trial. Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir.) cert. denied, 115 S.Ct. 639 (1994). The non-moving party meets the burden by directing the Court to specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324-25. Specifically, Rule 56(e) provides regarding plaintiff's burden:

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but by the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

In order to determine whether there are any genuine issues of material fact, the Court must first review the applicable substantive law to determine what factual issues are material. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). The Court must then consider the evidence bearing on those issues and must view the facts and inferences in the light most favorable to the non-moving party. Id. (citing Lavespere v. Niagara Machine & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990) reh'g denied 920 F.2d 259, cert. denied 510 U.S. 859 (1993)).

Analysis

The LHWCA provides for set compensation benefits for the death or disability of any maritime employee injured upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel and prohibits claims against the employer except for certain circumstances. Section 905(b) allows an employee to sue his employer for vessel negligence if the employer also is the owner of the vessel and there is vessel negligence. However, no claim for unseaworthiness is allowed under sec. 905(b). 33 U.S.C. sec. 902(3), 903(a). A worker making a claim under the LHWCA must satisfy both a "status" and a "situs" test. Director, Office of Workers' Compensation Programs v. Perini North

River Associates, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983); Bailey v. Global Marine, Inc., 714 F.Supp. 235, 239-40 (S.D. Texas 1989).

It is undisputed that Green was injured on a "situs" covered by the LHWCA. Vermilion argues Green cannot satisfy the "status" requirement of the LHWCA. The LHWCA defines a covered employee as "any person engaged in maritime employment,"[2] and it is well established that one of

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[2] The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in long-shoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker but such term does not include –

(A) Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) Individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) Individuals employed by a marina who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) Individuals who (i) are employed by suppliers, transporters, or vendors, (ii) or temporarily doing business on the premises

the essential elements of such status is the loading and unloading of vessels. Herb's Welding v. Grey, 470 U.S. 414, 423, 105 S.Ct. 1421, 1427, 84 L.Ed.2d 406 (1985); 33 U.S.C. sec. 902(3). However, the LHWCA sets out several specific exceptions to the term "employee," two of which Vermilion contends specifically exclude Green from coverage. First, the LHWCA specifically excludes from coverage "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet." Sec. 902(3)(B). Second, the LHWCA specifically excludes coverage for "any person

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> of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
> (E) Aquaculture workers;
> (F) Individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
> (G) A master or member of a crew of any vessel; or
> (H) Any person engaged by a master to load or unload or repair any small vessel under 18 tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.
33 U.S.C. sec. 902(3).

engaged by a master to load or unload or repair any small vessel under 18 tons net." sec. 902(3)(H).

Vermilion argues that the sole basis for Green's claim of longshoreman status is his alleged duty to load and unload several vessels owned by Vermilion; Vermilion argues, however, that the fact that these vessels are all small vessels under 18 tons net specifically excludes him from coverage under the LHWCA. Vermilion stated in its Statement of Undisputed Material Facts that "[t]he boat being operated by Lee Guidry at the time of Sam Green's alleged accident was under 18 tons net." Defendant's Mem. In Supp., Statement of Material Facts at para. 25 (No. 26). Green, in his response to Vermilion's Statement of Undisputed Material Facts, admits that the boat being operated by Lee Guidry at the time of Sam Green's alleged accident was under 18 tons net. Defendant's response to mover's Statement of Material Fact (No. 28). Vermilion has produced the affidavit of Arthur C. Sargent, a naval architect, wherein Sargent states that after reviewing the data on both vessels, the M/V TEAL and M/V GADWALL, he has concluded that both would measure less than 18 tons net. Defendant's Mem. in Supp., Affidavit of Arthur C. Sargent (No. 26). Therefore, it appears undisputed that whether plaintiff was injured on the M/V TEAL or the M/V GADWALL, plaintiff was engaged with a vessel under 18 tons net.

Green's sole allegation in his complaint in support of his claim of longshoreman status is as follows:

> At all times relevant herein, particularly on May 10, 1994, Complainant Green was working on a non-repair assignment aboard the supply boat, M/V "Teal", owned, operated and/or chartered by the Defendant(s), The Vermilion Corporation and/or Radcliffe Materials, Inc., when he was involved in an accident aboard the vessel while boarding the vessel and slipping on a slippery deck upon landing on the vessel M/V "Teal."

Complaint at para. 3 (No. 1). Green presents no other factual allegations in his Complaint, or argument in his memorandum in opposition to Vermilion's Motion for Summary Judgment, that would support a finding that he enjoyed longshoreman status. As such, this Court can only conclude that Green's sole basis for his claim of longshoreman status is the "non-repair," tying down and/or loading and unloading activities that he undertook upon the vessels M/V TEAL and M/V GADWALL.

Defendant argues Green is excluded from coverage as he falls within the abmit of sec.

902(3)(H). Green contends that sec. 902(3)(H) does not exclude him from coverage under the LHWCA as he was not "engaged by a master" to load or unload the vessel in question. Green does not provide any law or argument regarding the significance of the term "master" within the exception. Instead, Green presents an affidavit from William C. Key, a licensed Ocean Master, in which Key states that Guidry was "not qualified to be the captain of the M/V GADWALL, or any vessel of its class, in the Vermilion Corporation fleet." Plaintiff's Mem. in Opp., Affidavit of William C. Key (No. 27). Key also states that Guidry was not qualified to be a master at the time of the incident. However, neither party disputes that Guidry was operating and in charge of the vessel at all relevant times, i.e., that he was acting as a master of the vessel.

Neither party has been able to direct this Court to case law or legislative history that would assist this Court in its attempt to interpret sec. 902(3)(H). This Court's own research has uncovered no cases addressing this issue. Case law does address the distinction between a "master" and a "member of the crew" of a vessel, but such distinction is not relevant to the issue before this Court. Nonetheless, this Court concludes that to read "master" as narrowly as plaintiff argues would be a disservice to the intent of Congress in enacting

sec. 902(3)(H) as an exception to coverage under the LHWCA.

The Vermilion employee in charge of the vessel upon which plaintiff was injured, Guidry, initiated plaintiff's loading and unloading the vessel, and it is undisputed Guidry had control of the vessel, was operating the vessel and was acting on behalf of Vermilion. Guidry was in charge of the vessel, whether he technically was qualified to do so or not and was operating the vessel whether one would argue he lacked the technical qualifications to do so or not. Employees of like experience to Guidry's are likely to be those employees operating small vessels, i.e., those under 18 tons. Therefore, this situation is likely to arise any time one is dealing with a small vessel under 18 tons net.

It is plaintiff's duties of unloading and loading vessels owned by Vermilion, which plaintiff alleges Vermilion ordered him to perform, which he argues grants him status as a longshoreman. However, it is these very duties of loading or unloading those vessels that fall under the small vessel exception of the LHWCA. Although the LHWCA does provide one must be "engaged by a master," the Court declines to read the exception as narrowly as the plaintiff urges.

This Court finds Green is specifically excluded from coverage under the LHWCA by sec. 902(3)(H); therefore, this Court lacks jurisdiction over Green's claim under sec. 905(b) of the LHWCA. As this Court finds Green is excluded from coverage by way of sec. 902(3)(H), it need not reach Vermilion's argument that Green is excluded under sec. 902(3)(B), the "club" or "camp" exclusion.

Conclusion

This Court finds that plaintiff, Sam Green, cannot make a claim under LHWCA sec. 905(b) as he is specifically excluded from coverage under the LHWCA by sec. 902(3)(H). Although Vermilion indicates that such a finding necessitates a dismissal of all of Green's claims as Green's sole remedy would be Louisiana workers' compensation law, neither party has adequately briefed this issue so as to establish the facts upon which this Court can Rule. Therefore, The Vermilion Corporation's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. It is incumbent upon Vermilion, should it wish to pursue this argument, to properly place this issue before the Court. Vermilion is specifically granted permission to re-urge its motion within 15 days of receipt of this ruling, should Vermilion desire to do so.

THUS DONE AND SIGNED this 2 Day of May, 1997.

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE/OPELOUSAS DIVISION

SAM GREEN CIVIL ACTION NO. 95-2118

VERSUS JUDGE DOHERTY

THE VERMILION CORP., ET AL MAGISTRATE JUDGE TYNES

ORDER

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's, The Vermilion Corporation's, Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.

Lafayette, Louisiana, this 2 day of May, 1997

/s/ Rebecca F. Doherty
REBECCA F. DOHERTY
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED October 23, 1998
/s/ Charles L. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30782

SAM GREEN,

Plaintiff-Appellant,

versus

VERMILION CORP.,

Defendant-Appellee.

Appeal from the United States District Court

For the Western District of Louisiana

Before WISDOM, JOLLY, and HIGGINBOTHAM,

Circuit Judges.

PER CURIAM:

Treating the suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 10 1999
CLERK

No. 98-1128

In The

Supreme Court of the United States

October Term, 1998

VERMILION CORPORATION,

Petitioner,

v.

SAM GREEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit in its decision to allow Sam Green to pursue his general maritime negligence and unseaworthiness claim against Vermilion, his employer, despite the exclusivity provision of the Louisiana Workers' Compensation Act err, and, in doing so, create a split in the circuits of sufficient importance to warrant this court's review on a writ of certiorari?

PARTIES AND LIST PURSUANT TO RULE 29.1

The parties as stated in Pet. Cert. ii.

TABLE OF CONTENTS

Page

Question Presented i

Parties and List Pursuant to Rule 29.1 ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statement of the Case 1

Reasons for Denying the Writ 3

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Brockington v. Certified Electric, Inc., 903 F.2d 1523 (11th Cir. 1990) 3, 4, 5, 6, 7, 8

Brown v. ITT Rayonier Inc., 497 F.2d 234 (5th Cir. 1974) 3

Chase v. Louisiana Riverboat Gaming Partnership, La.App. 2 Cir. 2/25/98 (La.App. 2 Cir. 1998) 8

Chelentis v. Luckenback Steamship Co., 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1086 (1917) 4

Cope v. Vallette Dry-Dock Co., 7 S.Ct. 336, 119 U.S. 625, 30 L.Ed. 501 (1887) 10

East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) 4

Ellis v. Normal Life, 638 So.2d 422 (La.App. 5th Cir. 1994) 4

Executive Jet Aviation, Inc. v. Cleveland, 93 S.Ct. 493, 409 U.S. 429, 34 L.Ed.2d 454 (1972) 9

Green v. Vermilion Corp., 144 F.3d 332 (5th Cir. 1998) 1, 4, 7, 8, 10, 12

In re Treasure Bay Corp., 205 B.R. 490 (Bankr. S.D. Miss. 1997) 9

Ketzel v. Mississippi Riverboat Amusement, Ltd., 867 F.Supp. 1260 (S.D. Miss. 1994) 10

King v. Grand Casinos of Mississippi, Inc. – Gulfport, 697 So.2d 439 (Miss. 1997) 8

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920) 4

TABLE OF AUTHORITIES – Continued

Page

McAdow v. Promus Companies, Inc., 926 F.Supp. 93 (W.D. La. 1996) 8

Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560 (5th Cir. 1995) 8, 9

P.J. Carlin Const. Co. v. Heaney, 299 U.S. 41, 57 S.Ct. 75, 81 L.Ed. 27 (1936) 7

Preston O. King v. The President Riverboat Casino-Mississippi, Inc., 894 F.Supp. 1008 (S.D. Miss. 1995) 9, 10

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) 3

Waldron v. Moore-McCormack Lines, 87 S.Ct. 1410, 386 U.S. 724, 18 L.Ed.2d 482 (1967) 10

STATUTES

33 U.S.C. § 902(3) 10

BRIEF IN OPPOSITION

Respondent respectfully prays that this petition for a writ of certiorari to the Supreme Court of the United States be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 144 F.3d 332 (5th Cir. 1998) as is reproduced at Pet. App. A.

JURISDICTION

As will be shown, there is no jurisdictional basis for this Court to entertain the Petition for Writ of Certiorari. The Fifth Circuit's decision is not in conflict with the decision of another United States court of appeals on the same important matter.

STATEMENT OF THE CASE

Respondent, Sam Green was injured while mooring THE M/V GADWALL on navigable waters. Green claimed benefits under the Longshore and Harbor Worker's Compensation Act, in addition to asserting a cause of action for unseaworthiness and negligence under the General Maritime Law.

At the district court level, Green's claims under LHWCA and those under the general maritime law of

negligence and unseaworthiness were dismissed. On appeal, the Fifth Circuit Court of Appeals found that Green fell into the category of employees for which congress drafted the "club/camp" exception, and affirmed the district court's judgment denying LHWCA coverage to Green. However, the Fifth Circuit reversed the judgment of the district court dismissing Green's general maritime negligence and unseaworthiness claims. First, the Fifth Circuit determined that a remedy was available under the general maritime law of unseaworthiness since the LHWCA did not apply to Green. Secondly, the Fifth Circuit determined that Green could assert his general maritime negligence claim against his employer, despite the exclusivity provision of the Louisiana Workers' Compensation Act, relying on Supreme Court precedent.

Petitioner seeks this writ which essentially calls upon this Court to grant them total tort immunity against both the unseaworthiness claim and the negligence claim under the general maritime law despite the fact that there are no overriding state interests in the application of the workers' compensation law which would outweigh the federal interests regarding the uniformity in the application of the general maritime law.

Petitioner takes the following positions:

A. The decision of the Fifth Circuit creates a split in the circuits.

B. The decision of the Fifth Circuit creates a split in the circuits on an issue that is "important".

C. The decision of the Fifth Circuit is wrong.

REASONS FOR DENYING THE WRIT

NO SPLIT IN THE CIRCUITS

1. The Unseaworthiness Claim

Both the Eleventh Circuit[1] and the Fifth Circuit do in fact recognize that an unseaworthiness claim is available against the employer despite the availability of relief under the state's workers' compensation laws. Both Circuits recognize that unseaworthiness is a "right peculiar to the law of admiralty"[2] and the state worker's compensation statute can be disregarded in favor of permitting an action in general maritime law for unseaworthiness. In this case, where the LHWCA does not apply, the 1972 Amendments to the Act which abolished a longshoreman's unseaworthiness claim does not affect Green's claim since he falls outside the scope of the LHWCA. Consequently there is not a split in the circuits regarding this issue.

2. General Maritime Negligence

While it is true that the Eleventh Circuit in *Brockington* and the Fifth Circuit in *Green* arrived at contrary results, it is not entirely accurate to conclude that the circuits are split on the issue. Both Circuits weighed the federal interests in promoting uniformity in the application of federal maritime law against the state's interests in overriding the negligence claims of an employee against his employer via its workers' compensation statute.

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[1] *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990).

[2] *Id.* at 1531, citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) and *Brown v. ITT Rayonier Inc.*, 497 F.2d 234 (5th Cir. 1974).

The general maritime law is drawn from both federal and state sources and is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.[3] Within admiralty jurisdiction, the general maritime law applies unless preempted by federal legislation.[4] Under the general maritime law, a state law which changes, modifies, or affects maritime law may be given effect **unless**

> **it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.**[5]

The Fifth Circuit in *Green* did recognize the state's interest in overriding negligence claims of an employee, citing *Ellis v. Normal Life*, 638 So.2d 422 (La.App. 5th Cir. 1994). However, when the Court compared the importance of uniformity of admiralty law with the state's interests, the Court ultimately found that the Louisiana Worker's Compensation Act interfered with the proper harmony and uniformity of the general maritime law. On the other hand, the Eleventh Circuit in *Brockington* found the uniformity of the general maritime law and the usual

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[3] *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865, 106 S.Ct. 2295, 2299, 90 L.Ed.2d 865 (1986).

[4] *East River Steamship*, 475 U.S. at 864, 106 S.Ct. at 2298; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160-61, 40 S.Ct. 438, 440, 64 L.Ed. 834 (1920); *Chelentis v. Luckenback Steamship Co.*, 247 U.S. 372, 381, 38 S.Ct. 501, 503, 62 L.Ed. 1086 (1917).

[5] *Chelentis*, 247 U.S. at 381, 38 S.Ct. at 503, *emphasis ours.*

supremacy of the federal maritime law less significant in light of the comparative interests of the state.

The divergence results simply from the fact that when weighing the importance of uniformity of admiralty and the state's interests in the application of its worker's compensation laws, each court had certain details before it which entered into the court's assessment, thereby producing a different result.

The Eleventh Circuit in the *Brockington* case barred a plaintiff from asserting a negligence claim under the general maritime law where an exclusivity provision of a state workers' compensation scheme applied. Brockington was a land-based electrician who was injured as a result of a boating collision while being transported by boat to his job site. He brought a negligence claim only (no claim was made for unseaworthiness of the vessel) against his employer invoking the admiralty jurisdiction of the federal courts under general maritime law. The employer moved for summary judgment, arguing that the claim was barred by the provisions of the Georgia Workers' Compensation Act. He also stated a cause of action under the LHWCA. However, the court found that he was not a maritime employee as defined by the Act.

Recognizing that under certain circumstances state law may appropriately be applied by federal courts sitting in admiralty, the Eleventh Circuit then evaluated the

propriety of applying the Georgia law in these circumstances. Using the analysis of balancing the relevant state and federal interests, the Eleventh Circuit found the "interest in applying the general maritime law to the present action is not substantial." *Brockington*, 903 F.2d at 1532.

Turning to the state interest involved, the Eleventh Circuit found that Georgia's interest in applying state law is relatively high. Brockington was a land-based construction worker, the work to be performed was totally land-based construction. Brockington was injured on a ferry boat which was transporting him to his job site on a nearby island. Thus, the nexus to maritime activity in the *Brockington* case was very slight since the actual work performed by Brockington was completely non-maritime in nature. Brockington's only connection with the water was the fact that he happened to be traveling over it incidental to land-based employment. Furthermore, the provisions of Brockington's employment contract incorporated Georgia worker's compensation law. Furthermore, it does not appear from the decision that the contract had any relation to navigation.

On the other hand, in the case before this Court, there is a stronger nexus to maritime activity implicating serious concerns regarding uniformity in the application of general maritime law. Green was injured while mooring a vessel. Mooring vessels were part of Green's duties with Vermilion. Unloading and loading the boat was also a part of Green's duties, since all supplies, etc. had to be brought to the camp by boat. There is no employment contract between Green and Vermilion providing any expectation that the Louisiana Worker's Compensation

laws would apply. Consequently, the federal maritime interests were correctly assessed and accorded due weight.

In *Brockington*, the employment contract provision stipulating to the applicability of the state worker's compensation laws tipped the balance against application of the general maritime law. *Brockington* cited the U.S. Supreme Court case, *P.J. Carlin Const. Co. v. Heaney*, 299 U.S. 41, 57 S.Ct. 75, 81 L.Ed. 27 (1936) in support of its position.[6] That case involved a construction worker who was seriously injured when a violent explosion wrecked the ferry upon which he was traveling to an island job site. The Court ruled that the employment contract providing for coverage under the New York worker's compensation laws, must be given effect because the parties and the accident were local, the contract had no direct relation to navigation, and to enforce it against the parties would not materially interfere with the uniformity of any maritime rule. **These significant concerns are *not* present in the case before this Court.**

In the end, then, there is no genuine conflict among the circuits. *Brockington* should be limited to the facts that were present in the case. The Eleventh Circuit simply attributed more weight to the state interests: a land-based

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[6] "Apparently the court in *Brockington* only unearthed the line of Supreme Court cases giving preclusive effect to state workers' compensation statutes since it failed to cite any of the cases recognizing the superiority of general maritime tort claims over state remedies. *See Brockington*, 903 F.2d at 1532." *Green*, 144 F.3d at 342, fn.3.

worker, coincidentally on a ferry, under a contract for employment pursuant to state law.

NO IMPORTANT ISSUE

Petitioner claims this "split" would perpetuate different remedies for similarly situated persons. This argument fails to recognize the important distinctions found in the *Brockington* case as analyzed above. While, at first glance, the circuits appear split on the issue, in reality, the circuits did consider the competing interests. The Eleventh Circuit gave more weight to the state's interest based on certain factors; *Green* gave more weight to the federal interests due to the lack of factors lending to the state's interest which could override the application of the federal law. Simply put, there were no overriding state law components which would make the *Green* case one where state interests in the application of its law outweighed federal interests.

Petitioner argues that the *Green* decision would affect the workers employed in the casino gambling industry on dockside/floating casinos. Had Petitioner done the research, it would have discovered that the Louisiana courts and the Fifth Circuit Court of Appeals have already determined that the floating casinos are work platforms, and thus, not "vessels"[7] for purposes of the

[7] *Chase v. Louisiana Riverboat Gaming Partnership*, La. App. 2 Cir. 2/25/98 (La.App. 2 Cir. 1998); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995); *McAdow v. Promus Companies, Inc.*, 926 F.Supp. 93 (W.D. La. 1996); *King v.*

Jones Act and general maritime law. The courts considered, among other things, the activity associated with the alleged injury, *dockside gambling*, and held that there is not the sufficient nexus to traditional maritime activity to confer admiralty jurisdiction on the court.[8]

The definition of "vessel" is relevant since it can determine whether a case gives rise to admiralty jurisdiction, because tortious acts occurring aboard a vessel are presumed to fulfill the maritime nexus requirement for maritime tort jurisdiction.[9] The Admiralty Extension Act also confers federal jurisdiction to hear cases arising out of damages or injuries "caused by a vessel on navigable water."[10] Further, the applicability of various statutes, including the LHWCA depends on whether the structure is a vessel. In addition, general maritime law claims, such as unseaworthiness claims and salvage claims, require

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Grand Casinos of Mississippi, Inc. – Gulfport, 697 So.2d 439 (Miss. 1997); *In re Treasure Bay Corp.*, 205 B.R. 490 (Bankr. S.D. Miss. 1997). *Pavone* was a consolidated action which involved a bartender and waitress on a floating dockside casino who filed their individual actions alleging they were injured on a Jones Act vessel.

[8] *Preston O. King v. The President Riverboat Casino-Mississippi, Inc.*, 894 F.Supp. 1008 (S.D. Miss. 1995).

[9] *Executive Jet Aviation, Inc. v. Cleveland*, 93 S.Ct. 493, 409 U.S. 429, 34 L.Ed.2d 454 (1972).

[10] The Admiralty Extension Act, 46 U.S.C. § 740 (1988), provides, in part, that "[t]he admiralty and maritime jurisdiction . . . shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

that the structure be classified as a vessel to bring those claims.[11]

Courts have also held that even if these casinos were moving over navigable waters, they would be serving a purpose merely incidental to its primary function as a gambling facility.[12] Therefore, a casino worker injured on a dockside floating casino is precluded from asserting claims under the general maritime law. Consequently, the *Green* decision has no impact on the casino industry in the way suggested by Petitioner. Green was injured while mooring a **vessel**. . . . the action fell under admiralty jurisdiction and general maritime law applied.

THE RULING BELOW IS NOT WRONG

1. Seeking to Divine Congressional Intent

Petitioner suggests that the ruling is wrong because it was Congress who dictated that Green could not sue his employer in tort. According to the argument, Congress in promulgating 33 U.S.C. § 902(3) expressly excluded (A)-(F) workers only if they were covered under a state workers' compensation act. Furthermore, according to the argument, the Fifth Circuit ignored the clause in order to

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[11] See e.g., *Waldron v. Moore-McCormack Lines*, 87 S.Ct. 1410, 386 U.S. 724, 727, 18 L.Ed.2d 482 (1967) and *Cope v. Vallette Dry-Dock Co.*, 7 S.Ct. 336, 119 U.S. 625, 30 L.Ed. 501 (1887).

[12] *Preston O. King v. The President Riverboat Casino-Mississippi, Inc.*, 894 F.Supp. 1008, 1012 (S.D. Miss. 1995); *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F.Supp. 1260, 1263-68 (S.D. Miss. 1994).

fashion a new rule and to provide a new remedy which Congress has decided not to accept and considered itself to be unfettered by congressional intent.

Petitioner claims that since Congress added the condition that the employee be covered under a state compensation scheme then that meant Congress intended that the employee has no remedy in tort against its employer. Petitioner provides no support for what it thinks is the intent of Congress, no committee reports, no Statement of Congressional Intent, no part of the legislative record whatsoever. Petitioner's fundamental error is in suggesting that conformity with the provision forecloses the injured maritime worker, in spite of an existing state worker's compensation scheme, the right to his general maritime claims. As the jurisprudence shows, the existence of a state workers' compensation scheme does not automatically preclude a maritime worker from asserting his maritime claims. If Congress had wanted to foreclose a general maritime cause of action for unseaworthiness or negligence, it knew how to say so. But it did not and there is nothing at all in that section to support Petitioner's conclusion.

CONCLUSION

The Petitioner misapprehends the issue and seeks from this Court an ironclad rule that state worker's compensation statutes override federal maritime law. However, the considerations taken by both circuits do not justify such a rule. Such a rule would not serve the

purpose of the federal maritime law or federal supremacy. The considerations taken by both circuits cannot be ignored and the relevant facts are different so that the circuits responded to them in a different fashion. There are no serious and farreaching consequences of the *Green* decision.

Likewise, Petitioner fails to challenge the Fifth Circuit's analysis of the federal interests and state's interests. Nor is there any suggestion that the method employed in *Green* was novel. The only challenge is made to the holding and because the two circuits reached different results, Petitioner presupposes a conflict in the circuits.

Supreme Court, rule 10 provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion and that petition for a writ of certiorari will be granted only for compelling reasons. Rule 10 also states that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Nothing in the Petition provides a compelling reason for this Honorable Court to grant the writ of certiorari.

Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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